

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1406

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JAMES F. WEDALOWSKI,
Defendant-Appellee.

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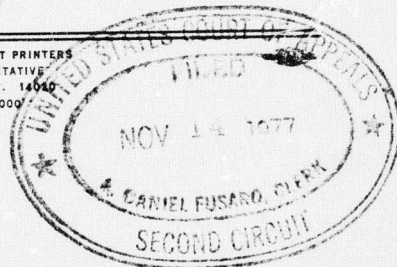
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT

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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-1406

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAMES F. WEDALOWSKI,
Defendant-Appellee.

On Appeal From the United States District Court
for the Western District of New York

BRIEF FOR THE APPELLANT

Preliminary Statement

On June 2, 1975 in the early morning hours, the Marine Midland Bank Branch in the Town of Niagara, New York was entered by several persons in an attempt to open the safe and take bank moneys therein. An alarm was activated and when law enforcement authorities arrived at the scene, no one was present at the bank but there was a large variety of physical equipment left at the scene including welding torches which were used in an attempt to enter the vault (App. 3).

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Inasmuch as this activity took place in the early morning hours when the bank was closed, there were no eyewitnesses to these activities and no one was found in the bank itself.

Defendant-Appellee, James F. Wedalowski, was found a short distance away from the bank and was charged on June 2, 1975 with a violation of Title 18, United States Code, Section 2113(b) involving the entry into the bank with the intent to commit a burglary while inside. A preliminary hearing was held on this matter on June 10, 1975 and probable cause was found by the U. S. Magistrate to have the defendant held over for Grand Jury proceedings.

During the time after the preliminary hearing, and prior to indictment, efforts by the FBI were concentrated in a large variety of scientific testing directed towards paint chips, soil samples, cloth fibers and hair samples which had been found at the scene of the bank robbery in an effort to develop a sound case against appellee James F. Wedalowski and others who may have been involved in this crime (App. 57-59). Defendant was eventually indicted on November 12, 1975 and charged with a violation of Title 18, United States Code, Section 2113(a) and Section 2 concerning the entry into the bank on June 2, 1975 (App. 6). Arraignment of the defendant was held on November 25, 1975 and the government filed its notice of readiness for trial on December 10, 1975. A motion to suppress certain evidence was made by the defendant and eventually decided by the court on May 18, 1977. On July 11, 1977 the court set a trial date of July 26, 1977 and at the same time defendant filed a motion for dismissal of the indictment based on various speedy trial grounds. After the selection of a jury on July 26, 1977 the judge then decided to grant the defendant's motion for lack of speedy trial finding that the government had not filed its

notice of readiness as required prior to six months after the date of defendant's arrest, and accordingly, declined to exclude certain time periods which are the basis of a major part of this appeal.

Statement of Facts

Defendant James F. Wedalowski was charged with the entry into the bank on June 2, 1975 shortly after the actual occurrence (App. 1).

A preliminary hearing was held on June 10, 1975 at which time the U. S. Magistrate found probable cause to believe the defendant had committed these crimes and bound him over for further action before the Grand Jury (App. 105).

Defendant was not indicted on these charges until November 12, 1975. The time in between the bank robbery and the indictment was taken up in large part with detailed scientific testing and analysis which was being completed by the FBI laboratories in this case (App. 57-59).

Samples of paint scrapings from the various welding equipment which was found in the bank were analyzed with chips found on Wedalowski and in his automobile, soil samples found in the bank were also analyzed, along with various clothing and fiber samples found on articles in the bank were analyzed against similar articles found on Wedalowski and in the nearby area (App. 57-59).

Additionally, it was necessary to analyze certain hair samples found in the bank with specimens which were taken from defendant Wedalowski (App. 58 and App. 11).

All of this intensive laboratory analysis took several months and was not completed until the end of September, 1975.

After the indictment on November 12, 1975 a notice of arraignment before the Magistrate was prepared and sent to Wedalowski's attorney, Salten Rodenberg, advising that the arraignment date would be set for November 18, 1975 (App. 7). The following day defendant requested an adjournment of his arraignment date until November 25, 1975 and a new notice of arraignment was prepared dated November 13, 1975 and said notice indicated that the adjournment was at the request of the defendant (App. 8).

Defendant was ultimately arraigned on November 25, 1975 and at that time the U. S. Magistrate set a schedule for discovery motions in this matter (App. 9). The Magistrate allowed the defendant until December 8, 1975 to make pretrial discovery motions and allowed the government until December 12, 1975 to answer these motions and argument on any of these motions would be had on December 16, 1975 before the Magistrate (App. 9).

No motions were received by December 8, 1975 and at an appearance before the Magistrate on December 9, 1975 it was indicated in the absence of defendant or his attorney, discovery would be deemed complete and the matter referred for trial (App. 106). The following day, December 10, 1975, the government filed its notice of readiness for trial in this matter (App. 10-11).

On January 19, 1976 defendant filed a motion for an order to suppress certain property found in a search warrant in this case and the matter was returnable on January 26, 1976 (App. 106). The matter was then adjourned at the request of the defendant and approved by the court and a new date for the return of the motion was February 9, 1976 (App. 12). On February 6, 1976 the government filed its response to this motion and argument was held on the return date of February

9, 1976. The court reserved decision on February 9, 1976 on this matter and the decision was never rendered until May 18, 1977, approximately 16 months after the motion had been filed (App. 107). The government wrote letters to the defense attorney on June 16, 1976, June 20, 1976, September 24, 1976, October 4, 1976, January 19, 1977 and April 11, 1977 advising him of continued readiness for trial and along with other trial related matters (App. 13-17). Copies of the June 16, 1976, September 24, 1976 and April 11, 1977 letters were also sent to Judge Elfvin so that he might note our continued wish to get this matter on for trial and our continued trial readiness (App. 13, 14, 17).

The decision handed down on May 18, 1977 called for a limited evidentiary hearing and May 31, 1977 was the date which was set for a court appearance to arrange a hearing date (App. 107). This appearance was adjourned until June 6, 1977 at the defense attorney's request and on June 6, 1977 a court hearing was scheduled for June 20, 1977. The Court made a ruling on this hearing and an Order and Findings of Fact dated July 6, 1977 denying the motion was filed and announcing that a trial date would be set at calendar call on July 11, 1977 (App. 107). On July 11, 1977 trial was scheduled to begin the week of July 26, 1977 (App. 107). At that time defendant filed for the first time a motion to dismiss the indictment on various speedy trial grounds (App. 18). This motion was made returnable the day before jury selection on July 25, 1977.

A jury was selected on July 26, 1977 and discussions were carried on by all parties on July 25, 1977 and again on July 26, 1977 concerning the motion to dismiss. Judge Elfvin declined to allow the government excludable time periods in deciding whether its notice of readiness was timely filed and held that

the government was seven days over the permissible limit in filing our notice of readiness on December 10, 1975. The judge denied excludable time for the periods in which arraignment had been adjourned at the request of the defendant and also denied any excludable time for the delay in submission of discovery motions by the defendant (App. 88, 95). In reaching this decision the court never decided whether the delay in deciding the defendant's motion to suppress would also have been grounds for the motion to dismiss.

ARGUMENT

POINT I

The court incorrectly calculated excluded periods of time under the Plan in determining whether the government timely filed its notice of readiness for trial.

The issue is whether Judge Elfvin correctly determined which time periods were excludable. The government contends that several specific time periods were properly excludable. The government further contends that, given the nature of this particular prosecution, as well as the intent and spirit of the Plan, even several days delay were permissible here and not prejudicial to the defendant. Rule 5 of the Plan set out "excluded periods" which would toll the six month time limit.¹

**'PLAN FOR ACHIEVING PROMPT
DISPOSITION OF CRIMINAL CASES**

(Approved February 28, 1973;

Effective April 1, 1973)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States

(Footnote continued on following page)

(Footnote continued from preceding page)

District Court for the Western District of New York have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

4. *All Cases: Trial Readiness and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. *Excluded Periods.*

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are *sub judice*.

(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The District Court shall grant such a continuance only if it is satisfied that the postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(Footnote continued on following page)

(Footnote continued from preceding page)

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

A. Adjournment of Arraignment at Defendant's Request.

Notice of arraignment was mailed to defendant on November 12, 1975 setting November 18, 1975 for arraignment before the U. S. Magistrate (App. 7). The defendant requested an adjournment of the arraignment until November 25, 1975 and a second notice of arraignment was mailed on November 13, 1975 advising the defendant of the new date set at his request. Defendant's request was granted, thereby delaying the proceedings for 7 days (App. 8). The 7 day period is reasonably excluded under either Rule 5(a) or Rule 5(b) of the Plan. Rule 5(a) excluded "periods of delay while proceedings concerning the defendant are pending" Rule 5(b) excluded "periods of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record"

The precise question of whether or not delay, resulting from the postponement of an arraignment granted solely at the request of the defendant is excludable time was confronted by the court in *United States v. Paunetto*, 406 F.Supp. 763 (E.D.N.Y. 1976). The court found the time properly excludable under Rule 6(b) of the Eastern District Plan which is identical to Rule 5(b) of the Western District Plan. The court appeared to rest its holding on the fact that the defendant's initiative obtained the postponement. In light of the foregoing, the government respectfully submits that in the case at bar the judge erred in disallowing the 7 day period as an excludable period under Rule 5 of the Plan. That conclusion also reflects what the government perceives as a less technical climate (particularly surrounding exclusions) under which the old Plan operated. That climate is reflected in the following comments by Judge Kaufman:

The Second Circuit rules regarding prompt disposition of criminal cases were not intended to strait jacket the administration of criminal justice in the Federal courts, . . . It was never intended that technicalities would carry the day. Some flexibility may be required in individual cases particularly when the government demonstrates that its normal practice comports with the letter and spirit of the rules, that it proceeded in good faith in the case under consideration and that the defendant has suffered no prejudice of his failure to be informed of the government's readiness for trial. *United States v. Pierro*, 478 F.2d 386, 389 (2nd Cir. 1973).

B. Period Between the Date of Mailing the Notice of Arraignment and the Date of Arraignment.

The government respectfully contends that not only is delay resulting from the adjournment of the arraignment at the defendant's request excludable time, but also the period between the date of mailing the notice of arraignment and the date of arraignment is excludable. Here, the original notice of arraignment was mailed on November 12, 1975 (App. 7). The original date of arraignment was November 18, 1975. When the defendant requested the adjournment a second notice was mailed on November 13, 1975 advising of the November 25, 1975 date. Therefore, 12 days should have been designated as excludable time in calculating the 6 month period under the Plan. *United States v. McDonough*, 504 F.2d 67 (2nd Cir. 1974).

United States v. McDonough, supra, a case cited by the defendant in support of its argument that the 6 month rule is absolute (App. 26), the court noted the government's entitlement to excluded periods. It explicitly referred to the period between mailing the notice of arraignment and the date of arraignment as an "excluded period" under the Plan. *McDonough, supra*, at 69. Thus, in addition to the 7 days due

to the actual postponement of the arraignment, the 5 days between the mailing of the notice and the original arraignment date should have been excluded.

C. Period of Delay While Proceedings Concerning the Defendant were Delayed.

At the November 25, 1975 arraignment, the discovery schedule was set for the filing of motions (App. 9). The defendant was given until December 8, 1975 to file motions. The government was to respond by December 12 and argument was to have been on December 16, 1975. Despite the fact that defendant had almost two weeks after the arraignment to file motions, he in fact did not file any motions by December 8, 1975, and the return date became December 9, 1975 at the Magistrate's calendar (App. 106). On December 9, 1975 the defense failed to appear without explanation, at the proceedings before the Magistrate (App. 106). Only at that point was discovery complete and only then could the government actually be ready for trial. Accordingly, the government filed its notice of readiness the very next day, December 10, 1975 (App. 10 & 11).

Had defendant promptly notified the government that he did not intend to file any discovery motions, the government could have filed its notice of readiness earlier than December 10, 1975. That may have safely placed the government in compliance with the six month requirement under the old Plan.

Defendant's request for time to file discovery motions arguably delayed the government's case 13 days (November 25, 1975 until December 8, 1975) since the defense never used the requested discovery schedule. Inasmuch as the government's hands are tied during the pendency of discovery motions, we would maintain that this is the type of delay Rule

5(a) or Rule 5(b) of the Old Plan sought to exclude, and should have been excluded in this case.

D. Delay Resulting from Government's Preparation for Trial Justified Further Excludable Periods.

Rule 5(c)(i) and (ii) of the Plan provide for excluded periods where evidence material to the government's case is unavailable or where additional time is justified by "exceptional circumstances." In this case, a substantial portion of the time between the defendant's arrest on June 2, 1975 and his indictment on November 12, 1975 (a period of approximately 5 months, the majority of the 6 month time period) was consumed by the government's diligent attempts to process evidence and complete scientific testing.

The bank burglary alleged in the indictment occurred in the middle of the night; defendants were not caught nor were there any witnesses present at the scene (App. 2-5). The case was substantially one of circumstantial evidence based on scientific testing. Paint, soil, hair, clothing and other samples were found and analyzed. The testing was conducted continuously by the FBI laboratory and results were unavailable until the latter part of September, 1975 (App. 57-59). At that point the government began to assimilate the results of the scientific testing and proceed with presentation of the case to the Grand Jury.

The government submits that it is inconsistent with the spirit and intent of the Old Plan to dismiss a case on the grounds that the government did not file a timely notice of readiness for trial when in fact all of the government's time was being spent actively preparing for trial. See *United States v. Pierro, supra*.

Rule 4 of the Circuit's Rule 50(b) Plan provides that even when the court does not find a basis for tolling any por-

tion of the six-month period (under Rule 5) the indictment may be finally dismissed only if the court does not find "that the government's neglect is excusable." Upon such a finding "the dismissal shall not be effective if the government is ready to proceed to trial within ten days." *United States v. Pierro*, *supra*, at 388, fn. 1

The government does not argue that all the time is excluded. It argues only that the circumstances of the case fall within the purview of the Old Plan so as to justify the government's late filing of its notice of readiness as "excusable". Rule 4 of the Old Plan which pertained to trial readiness and effect of non-compliance, stated that if the court found the government's neglect was excusable, then dismissal was not effective if the government was ready for trial within 10 days. The government re-emphasizes that any government neglect was excusable by virtue of the scientific testing and active preparation for trial by the government, and that it is undisputed that the government was ready to go to trial within 10 days of defendant's motion for speedy trial filed on July 11, 1977.

The government has attempted to set forth in Point I several examples of excludable time periods which should have been applied to this case. The government would also contend that a vigorous good faith attempt to bring this case to a trial readiness posture during the six months after June 2, 1975. We would draw the Court's attention to the language found in footnote 4 of *United States v. Flores*, 501 F.2d 1356 (2nd Cir. 1974) concerning the basic spirit behind the Plan for Achieving Prompt Disposition of Criminal Cases, feeling that those thoughts apply to any consideration of the technicalities of the Speedy Trial Act.

Although the burden of proof is on the Government to establish those times to be excluded from the six-month

period, and failure so to prove in the first instance should be determinative, we remand for further hearings because the Plan was not established primarily to safeguard defendants' rights. Rather the Plan, and the Second Circuit Rules before it, were to serve the public interest in the prompt adjudication of criminal cases. Thus, because it is not the defendant's personal interest being defended by the Plan, but rather the public's, whose interest is both in convicting criminals and in upholding the Plan, we feel it is not improper to give the Government a second opportunity to establish its compliance with the Plan.

United States v. Flores, supra, fn. 4

POINT II

Violation of the Western District Plan for Prompt Disposition of Criminal Cases requirement the defendant be brought to trial within 180 days does not justify dismissal of the indictment under the circumstances of this case.

As argued above, the government's action in filing its notice of readiness 8 days beyond the 6 month limit was excusable under the rules of the Old Plan. Judge Elfvin based his dismissal on the technical violation of the notice of readiness for trial requirement and therefore never reached the merits of the trial commencement issue.

Under the Western District of New York's Plan for the Prompt Disposition of Criminal Cases created pursuant to the Speedy Trial Act of 1974 (hereinafter cited as "New Plan"), defendant's trial should have commenced within 180 days of July 1, 1976 or by December 27, 1976. [New Plan, § 5(a)(1) and Title 18, United States Code, Section 3161(g)]. During that period, defendant's suppression motion was under ad-

visement, and therefore a period of 30 days excluded. (§ 10a of the New Plan, 18 USC § 3161(h)(1)(g), and App. 107). This factor extended the trial commencement time limit to January 26, 1977. Trial was eventually set for July 26, 1977. Ostensibly then, there was a 6 month delay without consideration of any other excludable periods.

Analyses of the problem is properly framed by the court's approach in *United States v. Carini*, Slip. Op. 1423 (2nd Cir. decided August 30, 1977). The first issue is whether the government's failure to comply with the Speedy Trial Act and the New Plan requires dismissal of the indictment and the government contends that this should be answered in the negative. The second issue is whether the 6 month delay upon the expiration of the 180 day statutory limit, or the 26 month delay from the time defendant was arrested until trial date, were violative of defendant's Sixth Amendment right to a speedy trial.

A. Dismissal Is Not Required by the New Plan.

Section 3163(c) of Title 18, the Speedy Trial Act, explicitly states that failure to comply with the time limits in the Plan does not require dismissal of the prosecution.

(c) Section 3162 of this chapter [sanctions] shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

Therefore, the 6 month violation of the statutory time limit here while the matter was *sub judice* does not require dismissal. The finding in *United States v. Carini*, *supra*, that congressional intent implies that no sanctions are in effect during the phase-in period of the Speedy Trial Act, should apply to this case. "No sanction for violation of the Act itself is in effect during the phase-in period", *Carini*, *supra*, 5604; H.R.Rep.

No. 1508, 93rd Cong., 2nd Session, 32 (1974). As a result, the government submits that the violation of either the Speedy Trial Act or the New Plan should not, in and of itself, be sufficient for dismissal of the indictment.

B. Defendant's Sixth Amendment Speedy Trial Rights.²

A constitutional challenge to an accused's right to a speedy trial under the Sixth Amendment is usually analyzed in terms of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). Four salient factors were identified by the court as useful in assessing whether a particular defendant has been deprived of his right: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Barker v. Wingo*, *supra*, at 530. Neither factor is a necessary or sufficient condition and each "must be considered together with such other circumstances as may be relevant." *Id.* at 533. An acknowledged violation of the Speedy Trial Act has been held to be "an additional relevant circumstance" to be considered in the court's determination. *United States v. Carini*, *supra*, at 5605. Recognizing that the various factors and circumstances do not present a precise test, they do provide an analytical framework within which to approach the problem.

The length of the delay in this case may be viewed in at least two ways. It would be 6 months if calculated from the last date on which trial should have commenced, or 26 months if calculated from the date of defendant's arrest until the actual trial date. In any event, the length is neither *per se* ex-

² Government acknowledges that defendant's original motion was grounded on Rule 48(b) of the Federal Rules of Criminal Procedure as well as the Sixth Amendment. However, for purposes of clarity and practicality, defendant's Rule 48(b) claim will be treated coterminously with his Sixth Amendment claim. *United States v. Vispi*, 545 F.2d 328 (2nd Cir. 1976); *United States v. Singleton*, 460 F.2d 1148, 1152 (2nd Cir. 1972).

cessive nor entirely dispositive of the issue. *United States v. Vispi*, 545 F.2d 328 (2nd Cir. 1976); *United States v. Carini*, *supra*. The bulk of the delay here, approximately 15 months, results from the time period when the suppression motion was *sub judice*.

Delay in this case was due primarily to the fact that defendant's suppression motion remained *sub judice* from February 9, 1976 until May 18, 1977—a period of approximately 15 months. The government recognizes that the 15 month delay is indeed disturbing. Moreover, it recognizes that it will be “ultimately” and “technically” responsible for such institutional delay. *Baker v. Wingo*, *supra*, at 531; *United States v. Carini*, *supra*, at 5608. Nonetheless, there are several relevant mitigating circumstances which require consideration.

In *United States v. Vispi*, for instance, where defendant's routine discovery motion was under advisement for 17 months, the government was criticized by the court for sitting back and relying on its “*pro forma* notice of readiness.” *Id.* at 334. The court described the government's affirmative duty in terms of “monitoring the case and pressing the court for a reasonably prompt trial”. *Id.* at 334. Here, above and beyond its *pro forma* notice, the government sent 5 additional letters to the judge and defense counsel declaring its continual readiness and requesting a trial date (App. 13-17).

It is the government's position that it fulfilled its duty as described in *Vispi*. Thus, since the delay was not caused by the government to gain a tactical advantage [*United States v. Roberts*, 515 F.2d 642, 646 (2nd Cir. 1975)], and since the government maintained affirmative, persistent correspondence with the court and defendant to move the case for trial, the factor of reason for delay should not be weighed

heavily in determining the correctness of defendant's Sixth Amendment claim.

It is undisputed that defendant never mentioned, let alone asserted, his right to a speedy trial until July 11, 1977—15 days before the trial actually began. This is not a case where defendant was attempting to demonstrate good faith compliance with particular statutory requirements in order to take advantage of an attractive plea bargain. *United States v. Carini, supra*. Nor is it a case where defendant "repeatedly and energetically asserted his right" to a speedy trial throughout the prosecution. *United States v. Vispi, supra*. Rather, this is a case where defendant has given the impression that he never really wanted a speedy trial and where there is insufficient showing of any assertion. See *United States v. Fasanaro*, 471 F.2d 717 (2nd Cir. 1973); *United States v. Infanti*, 474 F.2d 522 (2nd Cir. 1973); *United States v. Lane*, Slip. Op. (2nd Cir. Decided August 8, 1977).

Although defendant's delay in bringing the motion does not constitute a waiver, it is a reflection of defendant's failure to assert his right even when clear opportunities presented themselves. Importantly, defendant never made a motion for an immediate trial even upon receipt of the government's correspondences declaring its continual readiness, while Judge Elfvin was considering the suppression motion. The government asserts, therefore, that defendant clearly never actively asserted his right to a speedy trial, and that factor should be weighed against him.

We will next turn to prejudice caused to the defendant by any delay in obtaining a speedy trial. The government's argument on this point is based substantially on the statement of defense counsel that he agrees that he would be "hard put to show any actual bias accruing to us as might be required by

the due process requirement" (App. 25, 37, 38). Not only is defendant hard put to show that he suffered any of the hardship or prejudices which the Sixth Amendment intends to remedy, his objective circumstances as well belie any indications of prejudice. *Barker v. Wingo, supra*, dealt with prejudice which

"should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified 3 such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532.

Defendant has been free on bail since June 13, 1975 (App. 106). His personal freedom to move about, carry on a livelihood, and prepare his defense have not been infringed. The defendant has failed to make any showing whatsoever of personal infringement or adverse affect as a result of the pending criminal charges. The defendant suffered no pecuniary harm or professional degradation, nor was his ability to present a defense hindered by the length of the period of delay. *United States v. Vispi, supra*. Consequently this factor should be weighed against the defendant in determining his right.

The final factor to consider is the violation of the New Plan's time limits. This factor has been deemed a "relevant circumstance" by the court. *United States v. Carini, supra*, at 5605. In *Carini*, the court stated that the statutory delay assumed greater importance "viewed against the pre-existing background of protracted delay . . ." *Id.* at 5612. The violations were "clearly foreseen, yet, despite the significant prior delays and Carini's timely invocation of his Sixth Amendment rights, . . . they were permitted to occur." *Id.* at 5613.

The case presented here is clearly distinguishable. There was no pre-existing background of protracted delay. The case had moved along promptly until Judge Elfvin took the suppression motion under advisement for 15 months. During that time the government affirmatively attempted, beyond its *pro forma* notice, to have the case set down for trial. Moreover, and perhaps most importantly, defendant never made a "timely invocation" of his Sixth Amendment rights. In balance, the government contends that the "additional circumstance"—in violation of the New Plan—becomes less determinative under the facts of this case.

In summary, the government asserts that the "peculiar circumstances of the case" are such that no Sixth Amendment deprivation occurred. *Barker v. Wingo, supra*, at 530-531. The length of the delay was not excessive, defendant never asserted his right until 15 days before trial, defendant suffered no prejudice and the "additional circumstance" under *Carini* was not determinative as applied to these facts. The only factor weighing heavily against the government is the reason for the delay. Even though the courts have deemed that the United States is technically responsible for the institutional and judicial delay which occurred here, that factor must be mitigated by the government's affirmative efforts during that period, as well as the defendant's lack of any initiative during that same period despite proddings and reminders from the government.

Conclusion.

For the foregoing reasons, the government respectfully submits that Judge Elfvin's order granting defendant's motion and dismissing the indictment be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.

vs

James F. Wedalowski

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1406

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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Leslie R. Johnson

Sworn to before me this

11th day of November, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978

